IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, *et al.*, Individually and On Behalf Of All Others Similarly Situated,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. H-01-3624 (Consolidated)**
ENRON CORP., *et al.*,	§	
Defendants.	§	

DEFENDANT JEFFREY McMAHON'S MOTION TO DISMISS

Plaintiffs have failed to plead a securities fraud action against Jeffrey McMahon.[1] The deficiencies in the few allegations against Mr. McMahon are obvious under the standards established by this Court and others under Rule 9(b) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act (the "PSLRA").

Introductory Summary

The Complaint does not specifically accuse Mr. McMahon of any false statements or any self-dealing of any kind. It is not alleged that Mr. McMahon was involved in preparing any financial reports or Registration Statements on behalf of Enron. Except for prohibited group pleading, Mr. McMahon is mentioned in only twenty-one of the Complaint's one thousand thirty paragraphs and seven charts. Even if they are treated as true, the Complaint's allegations against Mr. McMahon would establish only that he worked at Enron, sold a small fraction of his Enron stock in one early

[1]Mr. McMahon joins in and incorporates by reference the arguments in the Defendants' Joint Brief Relating to Enron's Disclosures and the Joint Brief of Officer Defendants.

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2000 sale[2], and made six statements, none of which was a public statement on which investors could have relied prior to the filing of this lawsuit. As reviewed in detail below, those statements are not actionable on their face and Plaintiffs do not allege – other than in the most conclusory fashion – that any of those statements was false or misleading.

Plaintiffs' allegations of scienter are similarly lacking. Plaintiffs do not allege (1) what Mr. McMahon specifically knew at any point in time, (2) what material undisclosed information Mr. McMahon may have known, (3) when or how Mr. McMahon became aware of any such undisclosed material information, or (4) any facts giving rise to an inference that Mr. McMahon acted with the required state of mind. In fact, the only allegation of scienter relates to the Plaintiffs' "expert" witness who bases his conclusion on a "statistical" analysis of stock trading activity. In Mr. McMahon's case, this statistical analysis is based on a single stock sale.

Plaintiffs' allegations of insider trading are also inadequate. Plaintiffs allege only one sale that occurred before most of the conduct about which Plaintiffs complain. Even under Plaintiffs' allegations, Mr. McMahon *lost* millions of dollars on Enron stock that he did not sell. Plaintiffs have failed to identify what material inside information Mr. McMahon was aware of or anything suspicious or unusual about Mr. McMahon's single sale of Enron stock.

In short, Plaintiffs have not met the particularity requirement, the basis requirement, or the strong inference requirement of pleading an action under the PSLRA or Federal Rule of Civil Procedure 9(b) ("Rule 9(b)") as to Mr. McMahon. Plaintiffs' section 10(b) and Rule 10b-5 claims against Mr. McMahon should be dismissed because, under the Rule 9(b) and PSLRA standards, (1)

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[2]Plaintiffs actually allege six sales, but they are all on the same day and at the same price and Plaintiffs' "expert" analysis treats them as a single sale. (Complaint ¶ 83(q) and Declaration of Scott C. Hakala Ex. C).

Plaintiffs have failed to allege that Mr. McMahon made any material misrepresentation or omission, (2) Plaintiffs have failed to plead scienter or reliance, and (3) Plaintiffs have failed to state their claims with factual particularity.

I. THE APPLICABLE PLEADING REQUIREMENTS

The standards applicable to pleading this securities fraud case against Mr. McMahon are set forth in the Joint Brief of Officer Defendants, which is incorporated herein by reference. Among the pertinent requirements, as stated by this Court, is "Plaintiffs must allege what actions each Defendant took in furtherance of the alleged scheme and specifically plead what he learned, when he learned it, and how Plaintiffs know what he learned." *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d 860, 886 (S.D. Tex. 2001). As regards alleged misstatements, Plaintiffs must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Id.* at 865 n.14 (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir.), *cert. denied*, 522 U.S. 966 (1997)). It is therefore necessary to examine the "specific" allegations that have been made against Mr. McMahon.

II. THE ALLEGATIONS SPECIFICALLY REFERENCING McMAHON DO NOT MEET RULE 9(b) OR PSLRA PLEADING REQUIREMENTS.

"Specific" allegations about Mr. McMahon in the Complaint fall into three categories: (1) vague allegations of knowledge, representations, and omissions; (2) allegations of his position within Enron; and (3) allegations of his stock sale.

A. Plaintiffs' Complaint contains only vague references to Mr. McMahon's supposed knowledge, representations, and omissions.

In all of the Complaint, there are only six specific allegations regarding knowledge, representations, and omissions by Mr. McMahon.

1. The first is a sentence — repeated three times in the Complaint — in Sherron Watkins's notes prepared in preparation for her meeting with Ken Lay:

> Jeff McMahon was highly vexed over the inherent conflicts of LJM. *He complained mightily to Jeff Skilling* . . . . 3 days later, Skilling offered him the CEO spot at Enron Industrial Markets . . . .

(Complaint ¶¶ 59, 340, 850 (emphasis and ellipses in original)). This is insufficient to allege any fraudulent statement by Mr. McMahon. Plaintiffs do not even allege what Mr. McMahon said, much less when he said it, how or why it was false or misleading, or how or why he was supposed to have known of any alleged falsity. In fact, Plaintiffs appear to be in agreement with whatever Mr. McMahon may have said. In any event, if Mr. McMahon said anything to Mr. Skilling, it was not a public statement to investors and the market could not have relied upon it.

The allegation is also insufficient to allege any scienter on the part of Mr. McMahon because: (1) the statement is written by a third party; (2) there is no allegation or evidence that Mr. McMahon ever saw the statement, endorsed it, adopted it, or "entangled" himself in its making, *see In re Securities Litigation BMC Software, Inc,* 183 F. Supp. 2d 860, 871 (S.D. Tex. 2001); and (3) there is no allegation that Mr. McMahon ever actually made the statement, when it was made, or how Sherron Watkins became privy to the statement. Moreover, even if the allegation were sufficient and were taken as true, the allegation would only show that Mr. McMahon had knowledge of and complained about inherent conflicts with LJM.

2. The second reference to Mr. McMahon deals with Enron's buy back of LJM2's interest in MEGS. Plaintiffs allege that Mr. McMahon at first declined to approve the decision, writing instead: "There were no economics run to demonstrate this investment makes sense. Therefore, we cannot opine on its marketability or ability to syndicate." (Complaint ¶ 472). This

statement cannot form the basis of a securities fraud action against Mr. McMahon for the following reasons: (1) it is not even alleged to be false; (2) it was not a public statement and could not have been relied on by investors or the market; (3) even if it is intended to show knowledge by Mr. McMahon, Plaintiffs do not state what knowledge it shows Mr. McMahon had; (4) the statement is ambiguous as to Mr. McMahon's opinions about MEGS (it states only that he did not have enough information to approve the deal at the time); (5) nothing is alleged to show whether Mr. McMahon received the needed information; (6) nothing is alleged about whether Mr. McMahon approved the MEGS repurchase; (7) nothing is alleged to show that the statement was material; and (8) nothing is alleged to show that if the statement by Mr. McMahon had been made public, that it would have affected the stock price or investor decisions. The reference is far too vague and indefinite to support a claim that Mr. McMahon knew material, undisclosed information.

3. The third statement is taken from an October 25, 2001, Enron press release announcing Enron's draw down of committed credit lines by $1 billion to provide cash liquidity in light of its obvious difficulties. The press release attributes the following quote to Mr. McMahon:

> "*We are making it clear that Enron has the support of its banks and more than adequate liquidity to assure our customers that we can fulfill our commitments in the ordinary course of business*," said Chief Financial Officer Jeff McMahon. "This is an important step in our plan to restore investor confidence in Enron. Additionally, we will update investors over the next several days regarding our plans to maintain our long-term credit rating."

(Complaint ¶ 382 (emphasis in original)). This allegation cannot possibly support a fraud claim against Mr. McMahon because Plaintiffs do not allege that any part of this statement is false. To the contrary, it is undisputed that Enron *had* drawn down the lines of credit and that Enron *was* attempting to demonstrate that it had the support of its banks and that Enron *was* trying to ensure that

it had adequate liquidity to fulfill its commitments. Plaintiffs' own Complaint acknowledges that six days later, two banks extended an additional $1 billion in credit to Enron. If anything, this statement clearly acknowledges that there was a liquidity problem with the company and the credit rating was under pressure. As such, the statement functions as a disclosure statement. (Complaint ¶ 383). Additionally, this statement was made after the filing of some of these consolidated cases and could not have been relied upon by many of the putative class members.

Plaintiffs also do not allege that this statement was material. A misrepresentation is not actionable unless it is material. *Tuchman v. DSC Communications,* 14 F.3d 1061, 1067 (5th Cir. 1993). To meet the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson,* 485 U.S. 224, 231-32 (1988); *Rubinstein v. Collins*, 20 F.3d 160, 168 (5th Cir. 1994). Here, Plaintiffs do not plead that the statement affected the stock price, nor could it. According to the Complaint, the statement comes: (1) after Enron announced its $1.01 billion after-tax charge against earnings, (2) after *The Wall Street Journal* began an expose of the JEDI, Chewco and the LJM SPEs, (3) after the SEC announced an investigation of Enron, and (4) after Enron's Chief Financial Officer, Andrew Fastow, resigned. *See,* Complaint ¶ 61.

4. Plaintiffs next refer to Mr. McMahon when they quote a later (November 1, 2001) Enron press release that announced Enron obtaining commitments for an additional $1 billion of financing:

> "This is yet another step in our efforts to enhance market and investor confidence," said Jeffrey McMahon, Enron chief financial officer. "*We are moving aggressively to strengthen our balance sheet and maintain our investment grade credit rating.*"

(Complaint ¶ 383 (emphasis in original)). This statement, also made after some of these consolidated cases were filed, was also true, and Plaintiffs have not alleged anything to the contrary. As with the previous statement, Mr. McMahon is indicating that the balance sheet requires strengthening and the credit rating is under pressure. This is a disclosure statement, and this statement cannot possibly support any fraud claim.

5. The fifth allegation concerning Mr. McMahon is in reference to an analyst conference call – purportedly attended by Ken Lay, Greg Whalley, and Rick Causey, as well as Mr. McMahon – in which the following statements were allegedly made:

- *Enron had made some very bad investments. Investments such as Azurix, India and Brazil had performed poorly. Because of these investments, Enron became over- leveraged. Enron entered into related-party transactions that produced various conflicts of interest.*
- *Enron's core business was still the best franchise in the industry.*
- *Enron remained optimistic that actions to prevent insolvency substantially answered Enron's credit and liquidity questions. Enron's current transaction levels, while lower than the recent averages, have remained strong.*

(Complaint ¶ 388 (emphasis in original)). These statements cannot support a fraud claim against Mr. McMahon for at least four reasons. First, it is essentially a "group pleading;" none of the statements is attributed specifically to Mr. McMahon (or to anyone else). This court has rejected exactly this sort of group pleading. *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d at 913 n. 50 ("Because this court believes a more stringent pleading is required by the PSLRA, it agrees with those district courts that find the group pleading doctrine is at odds with the PSLRA and has not survived the amendments"). Second, even if the statements were attributed to Mr. McMahon, they do not support a fraud claim. Coming shortly before Enron's bankruptcy, the statements are

primarily negative, using words like "very bad investments," "performed poorly," and "over-leveraged." Plaintiffs certainly do not contend that these statements were false. The remaining statements about Enron's core business and its optimism are mere puffery and could not have been relied on in light of the total mix of information in the market at the time. *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 419 (5th Cir. 2001) ("[I]t is well-established that generalized positive statements about a company's progress are not a basis for liability.") (citation omitted). Third, Plaintiffs do not even attempt to allege — much less state facts or explain — how any of these statements could have been material or affected Enron's stock price. Fourth, the statements were made after some of these consolidated cases were filed.

6. The sixth statement is a newspaper quote of Mr. McMahon allegedly stating that he had no involvement in one of the projects at issue:

> Enron's current chief financial officer, *Jeffrey McMahon*, says he had nothing to do with Braveheart or related partnerships. "I'm not going to defend them," he says.

(Complaint ¶ 729; emphasis in original). This statement could not support any fraud claim because it was made after this suit was filed and is on its face, exculpatory. Plaintiffs do not allege that this statement was false or misleading[3] and do not indicate that Mr. McMahon had any knowledge of

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[3]Plaintiffs allege that Mr. McMahon was interviewed as part of the Enron investigation resulting from the Sherron Watkins's letter to Ken Lay. Quoting from Vinson & Elkins's investigation report, Plaintiffs emphasize the general statement that "[i]n summary, none of the individuals interviewed could identify any transaction between Enron and LJM that was not reasonable from Enron's standpoint or that was contrary to Enron's best interests. . . ." (Complaint ¶ 855). Even if one were to argue that this was somehow a statement attributable to Mr. McMahon, it is at best a prohibited group pleading. It also fails as a fraud allegation under the PSLRA because it fails to state what he said, when he said it, how it was false, how he could have known it was false, or how or why it would have been material. It also fails as a fraud allegation against Mr. McMahon because he had no control over the Vinson & Elkins report. Taken in the most favorable light for Plaintiffs, the allegation is only that Mr. McMahon did not know of any material, undisclosed information. Plaintiffs allege no specific facts about Mr. McMahon that contradict that conclusion.

these transactions.

Taken together or separately, these statements and alleged omissions do not raise a securities fraud claim against Mr. McMahon, much less state a claim under the PSLRA. While throughout the Complaint Plaintiffs sprinkle conclusory allegations to the effect that "each of the statements issued between [certain dates] was false and misleading" (*see, e.g.* ¶ 390), Plaintiffs make no effort to state why or how any of the statements by Mr. McMahon are false or misleading. Indeed, as shown above, the statements are not misleading on their face. Each of the statements attributed to Mr. McMahon in the Complaint is contained within longer documents that contain a variety of statements from a number of different people or sources. In that context, a conclusory statement that "each" statement is false and misleading does not meet the PSLRA requirement to state specifically how any statement complained about was false or misleading or how the statement was material. Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent the granting of a motion to dismiss. *Southern Christian Leadership Conference v. Supreme Court of State of Louisiana,* 252 F.3d 781, 786 (5th Cir. 2001); *Campbell v. City of San Antonio,* 43 F.3d 973 (5th Cir. 1995); *Fernandez-Montes v. Allied Pilot's Ass'n,* 987 F.2d 278, 284 (5th Cir. 1993). Finally, none of the statements or omissions by Mr. McMahon is material. Plaintiffs do not allege facts to show that any of the statements or omissions attributed to Mr. McMahon had an impact on the market price of Enron stock.

B. Plaintiffs' allegations of position are insufficient to state a claim.

Most of the Complaint's references to Mr. McMahon are allegations as to his position or office within Enron. For example:

Paragraph 1 Mr. McMahon is listed as a top Enron executive.

Paragraph 83(p)	Mr. McMahon was Executive Vice President, Finance and Treasurer of Enron since 7/99.
Paragraph 88	Mr. McMahon is listed as part of Enron's "Management Committee" for 1998 and 1999.
Paragraph 502	Plaintiffs state that Mr. McMahon was a manager of Egret until he resigned in 5/00.
Paragraph 708	Mr. McMahon is alleged to have been part of "Fastow's field marshals," until Glisan took over from Mr. McMahon as treasurer.

In addition, Paragraphs 653, 675, 694, 716, 736, 751, 763, 774, and 788 make the identical statement on behalf of each bank Defendant that "top officials of the bank constantly interacted with top executives of Enron, *i.e.*, Lay, Skilling, Causey, McMahon or Fastow, on almost a daily basis throughout the Class Period."

None of these references contains anything that would remotely state a claim against Mr. McMahon. Taken most favorably to the Plaintiffs, the allegations establish only that Mr. McMahon was an officer of Enron during some portion of the class period, that Mr. McMahon was a manager of Egret until May 2000, and that Mr. McMahon had unspecified interactions with "top" bank officials during his time as Treasurer of Enron (which is hardly surprising or suspicious for the Treasurer of any large company).[4]

While the Complaint also alleges that "virtually all of Enron's top insiders have been kicked out of the Company" (Complaint ¶ 4), Mr. McMahon was promoted to President and asked by the new CEO to lead the company out of bankruptcy. He also has cooperated fully with all investigations of Enron by Congress, the SEC, and others. These factors tend to *exonerate* Mr.

[4] Allegations as to Mr. McMahon's status as an officer of Enron are not sufficient to state a claim against him for securities fraud. *See* Section II.A of Joint Brief of Officer Defendants.

McMahon, independent of Plaintiffs' failure to plead a securities fraud action against him.

C. Plaintiffs Do Not Allege Actionable "Insider Trading" by McMahon.

In Paragraphs 83(p), 84 and 401, Plaintiffs cite trading history of Mr. McMahon showing one stock sale in early 2000 in an effort to assert an insider trading claim against him. Plaintiffs attempt to support its "insider trading" claim with the conclusion of its "expert" that it was statistically "more probable than not" that Mr. McMahon's one stock trade was made with "the possession and use of material adverse non-public information." (Complaint ¶ 415) This "expert analysis" is clearly statistically lacking and does not take into account other material information such as portfolio concentration, vesting dates, and other material individualized trading information. The Hakala Declaration should not even be considered by this Court. *See* Joint Brief of Officer Defendants at Section II.C.2. Further, as alleged in paragraph 415, the "certainty" of Plaintiffs' allegation, based on Dr. Hakala's inadmissible analysis, that Mr. McMahon engaged in illegal insider trading is at best "more probable than not"; this contrasts markedly with what Plaintiffs attest to be the "scientific acceptance standard (95%)." Plaintiffs' effort to allege insider trading against Mr. McMahon fails and the insider trading claims against Mr. McMahon should be dismissed.

Plaintiffs have altogether failed to plead anything "unusual" or "suspicious" about Mr. McMahon's stock sale, or otherwise meet the requirements of Rule 9(b) and the PSLRA for pleading illegal insider trading, as reviewed in Section II.C.1 of the Joint Brief of Officer Defendants. None of the insider trading paragraphs identifies any specific material, publicly undisclosed information known to Mr. McMahon when he made the single stock sale about which Plaintiffs complain. Plaintiffs only generally allege that Mr. McMahon was in possession of some unspecified "adverse undisclosed information." (Complaint ¶ 83(p).) They do not plead that Mr. McMahon was aware

of any specific non-disclosure; nor do they allege that Mr. McMahon was aware of any public misstatement. It is well settled that simply being a member of management – *i.e.*, in a position to know inside information – does not equate to scienter or knowledge of false statements. *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 412 (5th Cir. 2001) (allegations of motive and opportunity alone are almost always insufficient to establish scienter). This is the kind of generalized, non-specific allegations the PSLRA outlawed. Paragraph 83(p) is further flawed by the absence of any allegation that the undisclosed information (itself unidentified) was material. The Complaint is devoid of (1) any specific allegations concerning nonpublic information (2) of which Mr. McMahon was aware or (3) how Mr. McMahon knew the undisclosed information was material or nonpublic. *See In re Securities Litigation BMC Software,* 183 F. Supp. 2d at 916.

Plaintiffs also make no specific allegations regarding how Mr. McMahon's sales are improper, unusual, or suspicious. The closest Plaintiffs come is to allege that "[t]hese defendants' illegal insider selling escalated massively as Enron's stock moved to more inflated levels during the Class Period and also when internally they knew the scheme was unraveling." This is yet another instance of group pleading, prohibited by the PSLRA, and is clearly inaccurate in Mr. McMahon's case relating to his one stock sale.

Beyond that defect, Plaintiffs' asserted insider trading claim against Mr. McMahon fails – and must be dismissed – for the following reasons. Plaintiffs do not – and cannot – allege a "pattern" of trading by Mr. McMahon. Plaintiffs allege only one sale by Mr. McMahon. One point does not a pattern make.

Second, Mr. McMahon's insider trades or "pattern" (such as it is) are inconsistent with Plaintiffs' allegations concerning the "pattern" of other Defendants who, according to the Complaint,

were also "aware" of some undisclosed information. Indeed, according to the Complaint, one or more (but not all) of the Defendants collectively sold in almost every month of the Class Period. Plaintiffs then claim that each Defendant's sales "pattern" – although different from the others – somehow supports the same statistically certain inference. If, however, there truly is a specific "pattern" that demonstrates the use of inside information and other Defendants' sales match or establish that pattern, then Mr. McMahon's *single* sale cannot possibly match that purported pattern. For example, it is patent nonsense for Plaintiffs to allege that Mr. McMahon's "pattern" of a single trade matches the "pattern" of Mr. Lay's trades (which number in the hundreds) and that both are recognized patterns of trading on inside information. *Any* trading "matches" this "pattern." Indeed, according to Plaintiffs, every sale by every insider was suspect. Like all "one size fits all" garments, Plaintiffs' droops here and pinches there.

Third, Mr. McMahon's single sale occurred in March 2000, before most of the alleged wrongdoing, well before the market peak, at a time when he is not alleged to have been a member of the management committee (Complaint, p. 94), and twenty months before the end of the Class Period. Contrary to Plaintiffs' general group allegation that all of the insider Defendants' sales "escalated massively as Enron's stock moved to more inflated levels during the class period," Mr. McMahon had no further sales as the stock price increased. His sale came at $69 a share, twenty dollars below the eventual market peak during the Class Period.

Fourth, the timing of Mr. McMahon's sale is neither suspicious nor unusual. Every share of the stock Mr. McMahon sold on March 16, 2000, was vested to him on or around that same date. This is exactly the type of activity that one would expect from a rational investor seeking to diversify

his portfolio.[5] To establish "suspicious timing," Plaintiffs must show that Mr.McMahon's trades were "at times calculated to maximize personal benefit" to him. *In re Apple Computer Litigation*, 886 F.2d 1109, 1117 (9th Cir. 1989). A recognized example would be the sale of a significant percentage of his shares "immediately before a negative earnings announcement." *See, e.g., Wenger v. Lumisys*, 2 F. Supp. 2d 1231, 1251 (N.D. Cal. 1998). Conversely, sales made before the market peak, after its fall, or at other times not maximizing seller's proceeds, give rise to no inference of scienter. *See Nathenson,* 267 F.3d at 420-21 (sales made when stock well below "class period high" were "so inauspiciously timed" they "d[id] not meet this test."); *Greebel v. FTP Software*, 194 F.3d 185, 206 (1st Cir. 1999) ("timing does not appear very suspicious" where stock not "sold at the high points of the stock price."). "When insiders miss the boat [by selling well off the market peak], their sales do not support an inference" of scienter. *Ronconi v. Larkin*, 253 F.3d 423, 435 (9th Cir. 2001). Mr. McMahon's single challenged sale does not support an inference of scienter.

Fifth, according to Plaintiffs' own allegations, the shares sold by Mr. McMahon amounted to only 29.20 percent of his total shares. Even by Plaintiffs' analysis, Mr. McMahon left the great majority of his Enron stock in Enron. Courts have frequently held that even an allegedly suspicious sale of securities does not support an inference of scienter if it was only a fraction of the seller's holdings, or if the seller retained a significant percentage of his stock. *See Nathenson,* 267 F.3d at 420-21; *Advanta*, 180 F.3d 525, 540-41; *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 987 (9th Cir.), *reh'g and reh'g en banc denied*, 195 F.3d 521 (9th Cir. 1999). As this Court has noted:

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[5]Under Plaintiffs' model, however, an Officer Defendant who sold everything as it vested (a not irrational diversification strategy), or simply sold enough to cover taxes on the exercise of options, would automatically be assumed to have traded on illegal inside information, *even if he had no inside information.*

"Retention of the vast majority of their stock negates any inference of scienter." *In re Waste Management, Inc. Securities Litigation*, C.A. No. H-99-2183 (S.D. Tex. Aug. 16, 2001) at *131. Contrary to suggesting the intent to cash out based on inside information of Enron's impending doom, Mr. McMahon's trading history suggests either that he had no inside information or that he did not use any such information to his own benefit. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997); *In re Securities Litigation BMC Software,* 183 F. Supp. 2d at 902 (*citing, In re FVC.COM Sec. Litig.*, 136 F. Supp. 2d 1031, 1038-39 (N.D. Cal. 2000) (sales of twenty-nine percent by one defendant and thirty percent by another are "insufficient to support an inference of scienter"); *Wenger v. Lumisys,* at 1238 n. 6, 1251 (sales of twenty-six percent, thirty-eight percent, twenty-five percent, and thirty-two percent held not suspicious).

Further, analysis of the alleged percentages of stock sales by Mr. McMahon must be placed in the context of the extraordinarily long class period selected by Plaintiffs – 37 months. *See* Joint Brief of Officer Defendants at Section III.A.1. It is obvious that more sales would occur in a three-year class period than in a shorter, more reasonable timeframe. A number of courts have found nothing suspicious or alarming in sales of stock by insiders in percentages that, if adjusted to reflect a three-year "window," would dwarf Mr. McMahon's sales. *See, e.g., Silicon Graphics*, 183 F.3d at 985-86, 987 (sales by some individuals ranging up to 75 percent insufficient to infer scienter even in a fifteen week class period); *Ronconi*, 253 F.3d at 435 (sale of 17 percent of holdings in a seven-month period clearly "not suspicious in amount."); *Waste Management,* at *16 & *131 (no basis for strong inference of scienter when individuals sold as much as 39.6 percent in a five-month class period).

In sum, Plaintiffs have not pleaded adequate specific facts to support a claim for insider

trading against Mr. McMahon.

III. PLAINTIFFS' SECTION 20(a) AND 20A CLAIMS AGAINST MR. McMAHON SHOULD BE DISMISSED.

For the reasons set forth in section III of the Joint Brief of Officer Defendants, Plaintiffs have failed to plead an actionable claim against Mr. McMahon under either sections 20(a) or 20A of the Exchange Act.

Respectfully submitted,

Jacks C. Nickens
State Bar No. 15013800
1000 Louisiana Street, Suite 5360
Houston, Texas 77002
(713) 571-9191
(713) 571-9652 (Fax)

ATTORNEY-IN-CHARGE FOR DEFENDANT
JEFFREY MCMAHON

OF COUNSEL:

Paul D. Flack
State Bar No. 00786930
NICKENS, LAWLESS & FLACK, L.L.P.
1000 Louisiana Street, Suite 5360
Houston, Texas 77002
(713) 571-9191
(713) 571-9652 (Fax)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was forwarded to all counsel listed on the attached Exhibit A Service List by e-mail or facsimile on this 8th day of May, 2002.

Paul D. Flack

SERVICE LIST

Lead Counsel for *Newby* Plaintiffs: William S. Lerach Helen J. Hodges Byron S. Georgiou Milberg Weiss Bershad Hynes & Lerach LLP 401 B Street, Suite 1700 San Diego, CA 92101-5050 (619) 231-1058 (619) 231-7423 (fax) Melvyn I. Weiss Steven G. Schulman Samuel H. Rudman Milberg Weiss Bershad Hynes & Lerach, LLP One Pennsylvania Plaza New York, NY 10119-0165 (212) 594-5300 (212) 868-1229 (fax) Service by e-mail: enron@milberg.com	Local Counsel for *Newby* Plaintiffs: Roger B. Greenberg Schwartz, Junell, Campbell & Oathout LLP Two Houston Center 909 Fannin, Suite 2000 Houston, TX 77010 (713) 752-0017 (713) 752-0327 (fax) Service by e-mail: rgreenberg@schwartz-junell.com
Co-Lead Counsel for *Tittle* Plaintiffs: Lynn Lincoln Sarko Keller, Rohrback, LLP 1201 Third Avenue, Suite 3200 Seattle, WA 98101-3052 (206) 623-1900 (206) 623-3384 (fax) Service by e-mail: lsarko@kellerrohrback.com	Co-Lead Counsel for *Tittle* Plaintiffs: Steve W. Berman Clyde A. Platt, Jr. Hagens Berman, LLP 1301 Fifth Avenue, Suite 2900 Seattle, WA 98101 (206) 623-7292 (206) 623-0594 (fax) Service by e-mail: steve@hagens-berman.com

Local Counsel for *Newby* Plaintiffs: Thomas E. Bilek Hoeffner & Bilek LLP 440 Louisiana, Suite 720 Houston, TX 77002 (713) 227-7720 (713) 227-9404 (fax) Service by e-mail: tbilek722@aol.com	Liaison Counsel for *Tittle* Plaintiffs: Robin Harrison Justin M. Campbell, III Campbell Harrison & Dagley LLP 4000 Two Houston Center 909 Fannin Street Houston, TX 77010 (713) 752-2332 (713) 752-2330 (fax) Service by e-mail: rharrison@chd-law.com
Attorneys for Defendant Jeffrey Skilling: Robert M. Stern O'Melveny & Myers, LLP 555 13th Street, N.W., Suite 500W Washington, DC 20004-1109 (202) 383-5300 (202) 383-5414 (fax) Service by e-mail: rstern@omm.com	Attorneys for Defendant Enron: Kenneth S. Marks Stephen D. Susman Karen A. Oshman Susman Godfrey L.L.P. 1000 Louisiana, Suite 5100 Houston, TX 77002-5096 (713) 651-9366 (713) 654-6666 (fax) Service by e-mail: kmarks@susmangodfrey.com
Attorneys for Defendants Michael J. Kopper, Chewco Investments, LP, LJM Cayman, LP: Eric Nichols Beck, Redden & Secrest, L.L.P. One Houston Center 1221 McKinney, Suite 4500 Houston, TX 77010 (713) 951-3700 (713) 951-3720 (fax) Service by e-mail: enichols@brsfirm.com	Attorneys for Defendants The Northern Trust Company, Northern Trust Retirement Consulting LLC: Linda L. Allison Fulbright & Jaworski, LLP 1301 McKinney, Suite 5100 Houston, TX 77010 (713) 651-5628 (713) 651-5246 (fax) Service by e-mail: laddison@fulbright.com

Attorneys for Defendants David Stephen Goddard, Jr., Debra A. Cash, Michael M. Lowther: Billy Shepherd Cruse, Scott, Henderson & Allen, L.L.P. 600 Travis, Suite 3900 Houston, TX 77002-2910 (713) 650-6600 (713) 650-1720 (fax) Service by e-mail: bshepherd@crusescott.com	Attorneys for Defendants Philip J. Bazelides, Mary K. Joyce, James S. Prentice: Anthony C. Epstein Steptoe & Johnson, LLP 1330 Connecticut Ave., N.W. Washington, DC 20036 (202) 429-3000 (202) 429-3902 (fax) Service by e-mail: aepstein@steptoe.com
Attorneys for Defendant James V. Derrick, Jr.: Abigail K. Sullivan Bracewell & Patterson, L.L.P. South Tower Pennzoil Place 711 Louisiana, Suite 2900 Houston, TX 77002-2781 (713) 223-2900 (713) 221-1212 (fax) Service by e-mail: asullivan@bracepatt.com	Attorneys for Defendant Rebecca Mark-Jusbasche: John J. McKetta III Graves, Dougherty, Hearon & Moody, P.C. 515 Congress Avenue, Suite 2300 P.O. Box 98 78767 Austin, TX 78701 (512) 480-5600 (512) 478-1976 (fax) Service by e-mail: mmcketta@gdhm.com
Attorneys for Defendant Kenneth Lay: James E. Coleman, Jr. Diane Sumoski Carrington, Coleman, Sloman & Blumenthal, LLP 200 Crescent Court, Suite 1500 Dallas, TX 75201 (214) 855-3000 (214) 855-1333 (fax) Service by e-mail: deakin@ccsb.com	Attorneys for Defendants Bank of America Corp., Banc of America Securities LLC: Charles G. King King & Pennington, L.L.P. 711 Louisiana Street, Suite 3100 Houston, TX 77002-2734 (713) 225-8400 (713) 225-8488 (fax) Service by e-mail: cking@kandplaw.com

Attorneys for Defendants Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Charles A. LeMaistre, Wendy L. Gramm, Robert K. Jaedicke, Charles E. Walker, John Wakeham, John Mendelsohn, Paulo V. Ferraz Pereira, Frank Savage, Herbert S. Winokur, Jr., Jerome J. Meyer: Jeremy L. Doyle Robin C. Gibbs rgibbs@gibbs-bruns.com Kathy D. Patrick kpatrick@gibbs-bruns.com Gibbs & Bruns, L.L.P. 1100 Louisiana, Suite 5300 Houston, TX 77002 (713) 650-8805 (713) 750-0903 (fax) jdoyle@gibbs-bruns.com	Attorneys for Defendant John A. Urquhart: H. Bruce Golden Golden & Owens, L.L.P. 1221 McKinney, Suite 3600 Houston, TX 77010 (713) 223-2600 (713) 223-5002 (fax) Service by e-mail: golden@goldenowens.com
Pro se: Dr. Bonnee Linden Linden Collins Associates 1226 West Broadway P.O. Box 114 Hewlett, NY 11557 (516) 295-7906 Service by Federal Express	Attorneys for Defendant Ken L. Harrison: William F. Martson, Jr. Tonkon Torp, LLP 888 S.W. Fifth Ave., Suite 1600 Portland, OR 97204-2099 (503) 802-2005 (503) 972-7407 (fax) Service by e-mail: enronservice@tonkon.com
Carolyn S. Schwartz United States Trustee, Region 2 33 Whitehall St., 21st Floor New York, NY 10004 (212) 510-0500 (212) 668-2255 (fax) Service by fax	Attorneys for Defendant Andrew Fastow: Craig Smyser Smyser Kaplan & Veselka, L.L.P. 700 Louisiana, Suite 2300 Houston, TX 77002 (713) 221-2300 (713) 221-2320 (fax) Service by e-mail: enronservice@skv.com

Attorneys for Defendants Arthur Anderson LLP, C.E. Andrews, Dorsey L. Baskin, Michael L. Bennett, Joseph F. Berardino, Donald Dreyfus, James A. Friedlieb, Gary B. Goolsby, Gregory W. Hale, Gregory J. Jonas, Robert G. Kutsenda, Benjamin S. Neuhausen, Richard R. Petersen, Danny D. Rudloff, Steve M. Samek, John E. Sorrells, John E. Stewart, and William E. Swanson Russell (Rusty) Hardin, Jr. Andrew Ramzel Rusty Hardin & Associates, P.C. 1201 Louisiana, Suite 3300 Houston, TX 77002 (713) 652-9000 (713) 652-9800 (fax) Service by e-mail: aramzel@rustyhardin.com	Attorneys for Defendants Arthur Andersen LLP, Dorsey L. Baskin, Michael L. Bennett, Joseph F. Berardino, Donald Dreyfus, James A. Friedlieb, Gary B. Goolsby, Gregory W. Hale, Gregory J. Jonas, Robert G. Kutsenda, Benjamin S. Neuhausen, Richard R. Petersen, Danny D. Rudloff, Steve M. Samek, John E. Sorrells, John E. Stewart, and William E. Swanson Sharon Katz sharon.katz@dpw.com Daniel F. Kolb Michael P. Carroll Timothy P. Harkness Davis, Polk & Wardwell 450 Lexington Avenue New York, NY 10017 (212) 450-4000 (212) 450-5649 (fax) (212) 450-3633 (fax for service of papers) Service by e-mail: andersen.courtpapers@dpw.com
Attorneys for Defendants Banc of America Securities LLC and Salomon Smith Barney Inc.: Paul Vizcarrondo, Jr. Wachtell, Lipton, Rosen & Katz 51 West 52nd Street New York, NY 10019 (212) 403-1000 (212) 403-2000 (fax) Service by e-mail: pvizcarrondo@wlrk.com	Attorneys for Defendant Andersen Worldwide, S.C.: William Edward Matthews Gardere Wynne Sewell LLP 1000 Louisiana, Suite 3400 Houston, TX 77002 (713) 276-5500 (713) 276-5555 (fax) Service by fax

Attorneys for Defendants Vinson & Elkins, L.L.P., Ronald T. Astin, Joseph Dilg, Michael P. Finch, Max Hendrick, III: John K. Villa Williams & Connolly, LLP 725 Twelfth Street, N.W. Washington, DC 20005 (202) 434-5000 (202) 434-5029 (fax) Service by e-mail: jvilla@wc.com	Attorneys for Defendant Citigroup, Inc. and Salomon Smith Barney, Inc.: Jacalyn D. Scott Wilshire Scott & Dyer P.C. 3000 One Houston Center 1221 McKinney Houston, TX 77010 (713) 651-1221 (713) 651-0020 (fax) Service by e-mail: jscott@wsd-law.com
Attorneys for Defendant David B. Duncan: Barry G. Flynn Law Offices of Barry G. Flynn, PC 1300 Post Oak Blvd., Suite 750 Houston, TX 77056 (713) 840-7474 (713) 840-0311 (fax) Service by e-mail: bgflaw@mywavenet.com	Attorneys for Defendant LJM2 Coinvestments, LP: Mark A. Glasser Reginald R. Smith King & Spalding 1100 Louisiana, Suite 4000 Houston, TX 77002-5213 (713) 751-3200 (713) 751-3290 (fax) Service by e-mail: mkglasser@kslaw.com
Attorneys for Defendant Ben F. Glisan, Jr.: Tom P. Allen McDaniel & Allen, APC 1001 McKinney Street, 21st Floor Houston, TX 77002 (713) 227-5001 (713) 227-8750 (fax) Service by e-mail: tallen@mcdanielallen.com	Attorneys for Defendant Kristina Mordaunt: Robert Hayden Burns Burns Wooley & Marseglia 1415 Louisiana, Suite 3300 Houston, TX 77002 (713) 651-0422 (713) 651-0817 (fax) Service by e-mail: hburns@bwmzlaw.com

Attorneys for Defendant Michael C. Odom: Bernard V. Preziosi, Jr. Curtis, Mallet-Prevost, Colt & Mosle, L.L.P. 101 Park Avenue New York, NY 10178-0061 (212) 696-6000 (212) 697-1559 (fax) Service by e-mail: bpreziosi@cm-p.com	Attorneys for Defendant Kirkland & Ellis: Kevin S. Allred Kelly M. Klaus Munger, Tolles & Olson 355 South Grand Avenue, 35th Floor Los Angeles, CA 90071 (213) 683-9100 (213) 687-3702 (fax) Service by e-mail: allredks@mto.com
Attorneys for Defendant D. Stephen Goddard, Jr.: Michael D. Warden Sidley Austin Brown & Wood, LLP 1501 K Street, N.W. Washington, DC 20005 (202) 736-8000 (202) 736-8711 (fax) Service by e-mail: mwarden@sidley.com	Roman W. McAlindan The Sharrow 34 Lickey Square Barnt Green, Rednal, Birmingham, B45 8HB Great Britain Service by Federal Express
Attorneys for Defendant Thomas H. Bauer: Scott B. Schreiber Arnold & Porter 555 Twelfth Street, N.W. Washington, DC 20004-1206 (202) 942-5000 (202) 942-5999 (fax) Service by e-mail: enroncourtpapers@aporter.com	Attorneys for Defendant Nancy Temple: Mark C. Hansen Reid M. Figel Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. 1615 M Street, N.W., Suite 400 Washington, DC 20036 (202) 326-7900 (202) 326-7999 (fax) Service by e-mail: mhansen@khte.com rfigel@khte.com

Attorneys for Defendant Alliance Capital Management: Ronald E. Cook Cook & Roach, LLP Chevron Texaco Heritage Plaza 1111 Bagby, Suite 2650 Houston, TX 77002 (713) 652-2031 (713) 652-2029 (fax) Service by e-mail: rcook@cookroach.com	Attorneys for American National Plaintiffs: Andrew J. Mytelka David Le Blanc Greer, Herz & Adams, L.L.P. One Moody Plaza, 18th Floor Galveston, TX 77550 (409) 797-3200 (409) 766-6424 (fax) Service by e-mail: amytelka@greerherz.com dleblanc@greerherz.com bnew@greerherz.com swindsor@greerherz.com
Attorneys for Defendant Lou L. Pai: Murray Fogler McDade Fogler Maines, L.L.P. Two Houston Center 909 Fannin Suite 1200 Houston, Texas 77010-1006 (713) 654-4300 (713) 654-4343 (fax) Service by fax	Attorneys for Defendant Lou L. Pai: Roger E. Zuckerman Steven M. Salky Deborah J. Jeffrey 1201 Connecticut Avenue, N.W. Washington, D.C. 20036-2638 (202) 778-1800 (202) 822-8106 (fax) Service by e-mail: djeffrey@zuckerman.com
Philip A. Randall Andersen United Kingdom 180 Strand London WC2R 1BL England 44 20 7438 3000 44 20 7831 1133 (fax) Service by fax	Attorneys for Defendant Deutsche Bank AG: Lawrence Byrne Owen C. Pell Lance Croffoot-Suede White & Case, LLP 1155 Avenue of the Americas New York, New York 10036-2787 (212) 819-8200 Service by e-mail lbyrne@whitecase.com

Attorneys for Defendant Bank of America Corporation: Paul Bessette Brobeck, Phleger & Harrison, LLP 4801 Plaza on the Lake Austin, Texas 78746 (512) 330-4000 (512) 330-4001 (fax) Service by e-mail: pbessette@brobeck.com	Attorneys for Defendant Bank of America Corp.: Gregory A. Markel Ronit Setton Nancy Ruskin Brobeck, Phleger & Harrison LLP 1633 Broadway, 47th Floor New York, NY 10019 (212) 581-1600 (212) 586-7878 (fax) Service by e-mail: gmarkel@brobeck.com rsetton@brobeck.com nruskin@brobeck.com
Michael D. Jones Andersen United Kingdom 180 Strand London WC2R 1BL England 44 20 7438 3000 44 20 7831 1133 (fax) Service by fax	Attorneys for Defendant Alliance Capital Management: Mark A. Kirsch James F. Moyle James N. Benedict Clifford Chance Rogers & Wells 200 Park Avenue, Suite 5200 New York, NY 10166 (212) 878-8000 (212) 878-8375 (fax) Service by e-mail: james.moyle@cliffordchance.com james.benedict@cliffordchance.com mark.kirsch@cliffordchance.com

Attorneys for Defendant J.P. Morgan Chase & Co.: Richard Mithoff Mithoff & Jacks One Allen Center, Penthouse 500 Dallas Houston, TX 77002 (713) 654-1122 (713) 739-8085 (fax) Service by e-mail: enronlitigation@mithoff-jacks.com	Attorneys for Defendant J.P. Morgan Case & Co.: Bruce D. Angiolillo Thomas C. Rice Jonathan K. Youngwood Simpson Thacher & Bartlett 425 Lexington Avenue New York, NY 10017-3954 (212) 455-2000 (212) 455-2502 (fax) Service by e-mail: bangiolillo@stlaw.com trice@stblaw.com jyoungwood@stblaw.com
Attorneys for Defendant Credit Suisse First Boston Corp.: Lawrence D. Finder Haynes and Boone, LLP 1000 Louisiana Street, Suite 4300 Houston, TX 77002-5012 (713) 547-2006 (713) 547-2600 (fax) Service by e-mail: finderl@haynesboone.com	Attorneys for Defendant Barclays Bank PLC: David H. Braff Sullivan & Cromwell 125 Broad Street New York, NY 10004-2498 (212) 558-4000 (212) 558-3588 (fax) Service by e-mail: braffd@sullcrom.com candidoa@sullcrom.com brebnera@sullcrom.com
Attorneys for Defendant J.P. Morgan Chase & Co.: Chuck A. Gall James W. Bowen Jenkens & Gilchrist 1445 Ross Avenue, Suite 3200 Dallas, TX 75202-2799 (214) 855-4338 (214) 855-4300 (fax) Service by e-mail: cgall@jenkens.com jbowen@jenkens.com	Attorneys for Defendant Credit Suisse First Boston Corp.: Richard W. Clary Julie A. North Cravath, Swaine & Moore 825 Eighth Avenue New York, NY 10019 (212) 474-1000 (212) 474-3700 (fax) rclary@cravath.com

Attorneys for Defendant Merrill Lynch & Co., Inc.: Taylor M. Hicks Hicks Thomas & Lilienstern, LLP 700 Louisiana, Suite 1700 Houston, TX 77002 (713) 547-9100 (713) 547-9150 (fax) Service by e-mail: thicks@hicks-thomas.com	Attorneys for Defendant Barclays Bank PLC: Barry Abrams Abrams Scott & Bickley, LLP JP Morgan Chase Tower 600 Travis, Suite 6601 Houston, TX 77002 (713) 228-6601 (713) 228-6605 (fax) Service by e-mail: babrams@asbtexas.com
John L. Murchison, Jr. Vinson & Elkins, L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002 (713) 758-2222 (713) 758-2346 (fax) Service by e-mail: jmurchison@velaw.com	Attorneys for Defendant Citigroup: Brad S. Karp Mark F. Pomerantz Richard A. Rosen Michael E. Gertzman Claudia L. Hammerman Paul, Weiss, Rifkind, Wharton & Garrison 1285 Avenue of the Americas New York, NY 10019-6064 (212) 373-3000 (212) 757-3990 (fax) Service by e-mail: grp-citi-service@paulweiss.com
Andersen LLP (Andersen-Cayman Islands) 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express	Arthur Andersen (Andersen-United Kingdom) 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express
Andersen Co. (Andersen-India) 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express	Lehman Brothers Holding, Inc. c/o Thomas A. Russo 745 Seventh Avenue New York, NY 10019 (212) 526-7000 (212) 526-2628 (fax) Service by fax

Attorneys for Defendant Canadian Imperial Bank of Commerce: Alan N. Salpeter Michele Odorizzi T. Mark McLaughlin Andrew D. Campbell Mayer, Brown, Rowe & Maw 190 South LaSalle St. Chicago, IL 60603 (312) 782-0600 (312) 706-8680 (fax) William H. Knull, III Mayer, Brown, Rowe & Maw 700 Louisiana Street, Suite 3600 Houston, Texas 77002-2730 (713) 221-1651 (713) 224-6410 (fax) Service by e-mail: cibc-newby@mayerbrownrowe.com	Arthur Andersen-Puerto Rico (Andersen-Puerto Rico) 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express
Arthur Andersen-Brazil 33 W. Monroe Street Chicago, IL 60603 Service by Federal Express	Attorney for Joseph Sutton: Jack O'Neill Clements, O'Neill, Pierce, Wilson & Peterson 1000 Louisiana, Suite 1800 Houston, Texas 77002 (713) 654-7600 (713) 654-7690 Service by e-mail: oneilljack@copwf.com

Roger D. Willard 3723 Maroneal Street Houston, TX 77025 Service by Federal Express	Additional Counsel for Defendant Joseph Hirko: Barnes H. Ellis David H. Angeli STOEL RIVES LLP 900 SW 5th Avenue, Suite 2600 Portland, Oregon 97204 (503) 224-3380 (phone) (503) 220-2480 (fax) Service by e-mail: dhangeli@stoel.com
Additional Counsel for Kevin Hannon: Stephen J. Crimmins PEPPER HAMILTON LLP Hamilton Square 600 Fourteenth Street, N.W. Washington, D.C. 20005 (202) 220-1200 (202) 220-1665 (Fax) Elizabeth T. Parker PEPPER HAMILTON LLP 3000 Two Logan Square 18th and Arch Streets Philadelphia, PA 19103 (215) 981-4000 (215) 981-4756 (Fax) Service by e-mail: crimminss@pepperlaw.com parkere@pepperlaw.com	Attorneys for Defendants Richard B. Buy, Richard A. Causey, Mark A. Frevert, Stanley C. Horton, Kevin Hannon, Joseph Hirko, Steven Kean, Mark E. Koenig, Michael S. McConnell, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Paula Rieker, and Lawrence Greg Whalley Jacks C. Nickens Paul D. Flack Nickens, Lawless & Flack 1000 Louisiana, Suite 5360 Houston, Texas 77002 (713) 571-9191 (713) 571-9652 (fax) Service by e-mail trichardson@nlf-law.com

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs	§	
vs.	§	CIVIL ACTION NO. H-01-3624
	§	(Consolidated)
ENRON CORP., et al.,	§	
Defendants	§	

ORDER

Having considered the motion to dismiss filed by Defendant Jeffrey McMahon and all materials filed in support of and in opposition to this motion, and finding that the Complaint fails to state a claim against this Defendant upon which relief can be granted,

It is hereby ORDERED that:

1. Defendant's motion is GRANTED, and

2. The claims against Defendant Jeffrey McMahon are DISMISSED with prejudice.

SIGNED this _____ day of _____, 2002.

_____
Melinda Harmon
United States District Judge